NORTH SOUTH PROPERTIES SDN BHD & ORS

v.

DAVID TEH TEIK LIM & ANOR

COURT OF APPEAL, PUTRAJAYA
ABDUL MALEK AHMAD PCA
RICHARD MALANJUM JCA
AUGUSTINE PAUL JCA
[CIVIL APPEAL NO: W-04-23-2002]
16 AUGUST 2004
(9 MARCH 2005)

CIVIL PROCEDURE: *Action - Limitation period - Whether action commenced more than six years from date cause of action arose*

CONTRACT: *Letter of undertaking - Letter by directors of company - Undertaking that payment would be made for work done - Whether letter in fact a letter of comfort that had no legal implications*

The respondents as plaintiffs in the Sessions Court applied for summary judgment against the appellants as defendants for payment in respect of architectural services rendered to the first appellant. The second, third and fourth appellants were directors of the first appellant whilst the respondents were partners in a company called Pakatan Reka Arkitek. The Sessions Court allowed the respondents' application for summary judgment and the High Court confirmed it on appeal. Hence, the appellants' appeal to the Court of Appeal. It was not disputed that a cheque for payment in respect of the architectural services presented to the bank was stopped for payment. The appellants alleged that payment was stopped due to the unsatisfactory architectural services rendered by the respondents. It was also alleged that the second, third and fourth appellants were not liable under a letter of undertaking signed by them because it was a letter of comfort that was not binding. Further, the respondents were time-barred since they commenced the action more than six years from the date the cause of action arose for non-payment.

Held (dismissing the appeal)
Per Abdul Malek Ahmad PCA delivering the judgment of the court:

[1] Unlike a performance bond or guarantee that embodies a legally binding undertaking, a letter of comfort is usually a statement of moral responsibility that is not intended to have any legally binding effect. Whether a letter of comfort is capable of giving rise to a legally binding undertaking will depend on the intention of the parties and the circumstances under which the letter of comfort is given. The letter in the present case signed by the second, third and fourth appellants was in fact a letter of undertaking and not a letter of comfort. There was also no complaint made by the appellants as regards the architectural services rendered by the respondents at any stage. The agreement between them pursuant to the independent adjudicator's finding and the letter of undertaking by the second, third and fourth appellants was further testimony of the fact that the payment was correctly due from the appellants to the respondents. The cause of action accrued on the date of the postdated cheque because before the said date the respondents were not entitled to make any claim in view of the agreement made between the parties concerned. (pp 519 h & 520 a-b)

*[**Bahasa Malaysia** Translation Of Headnotes*

Responden selaku plaintif di mahkamah sesyen memohon penghakiman terus terhadap perayu selaku defendan berkaitan bayaran perkhidmatan rekabentuk yang diberikan olehnya kepada perayu pertama. Perayu-perayu kedua, ketiga dan keempat adalah pengarah-pengarah perayu pertama sementara responden-responden adalah rakan kongsi dalam syarikat yang dipanggil Pakatan Reka Arkitek. Mahkamah sesyen membenarkan permohonan responden untuk penghakiman terus dan Mahkamah Tinggi telah mengesahkannya di peringkat rayuan. Akibatnya, perayu merayu ke Mahkamah Rayuan. Tidak dinafikan bahawa sekeping cek bagi bayaran perkhidmatan rekabentuk berkenaan telah dibatalkan pembayarannya. Perayu mengatakan bahawa pembayaran telah dibatalkan kerana perkhidmatan rekabentuk yang diberikan oleh responden tidak memuaskan. Dikatakan selanjutnya bahawa perayu kedua, ketiga dan keempat adalah tidak bertanggungan di bawah akujanji yang ditandatangani oleh mereka, kerana akujanji tersebut hanyalah suatu surat tenteram (letter of comfort) yang tidak mengikat mereka. Lagipun, responden telah dihalang oleh had masa kerana memulakan tindakan selepas enam tahun dari tarikh berbangkitnya kausa tindakan ekoran kegagalan membayar di sini.

Diputuskan (menolak rayuan)
Oleh Abdul Malek Ahmad PMR menyampaikan penghakiman mahkamah:

[1] Berlainan dengan bon pelaksanaan atau gerenti yang mengandungi akujanji yang mengikat di sisi undang-undang, suatu surat tenteram biasanya hanyalah merupakan pernyataan mengenai tanggungjawab moral yang tidak diniat untuk mempunyai sebarang kesan undang-undang. Sama ada sesuatu surat tenteram itu boleh membangkitkan akujanji yang mengikat di sisi undang-undang akan bergantung kepada niat pihak-pihak dan keadaan di mana surat tenteram tersebut dibuat. Surat dalam kes ini yang ditandatangani oleh perayu kedua, ketiga dan keempat sebenarnya adalah surat akujanji dan bukannya surat tenteram. Juga tidak terdapat bantahan oleh perayu pada bila-bila masapun terhadap perkhidmatan rekabentuk yang diberikan oleh responden. Perjanjian di antara mereka, yang menyusuli rumusan yang dibuat oleh penimbangtara bebas serta surat akujanji oleh perayu kedua, ketiga dan keempat, adalah bukti bahawa memang terdapat bayaran yang harus dibayar oleh perayu kepada responden. Kausa tindakan berbangkit pada tarikh cek kebelakangan yang berkenaan, oleh kerana, sebelum tarikh tersebut, responden tidak berhak untuk membuat sebarang tuntutan mengambilkira perjanjian yang dibuat di antara pihak-pihak terbabit.

Case(s) referred to:
Hemp v. Garland 4 QB 519 ***(refd)***
Nadefinco Ltd v. Kevin Corporation Sdn Bhd [1978] 2 MLJ 59 ***(refd)***
Reeves v. Butcher [1891] 2 QB 509 ***(refd)***

Legislation referred to:
Subordinate Courts Rules 1980, O. 26A

Other source(s) referred to:
Poh Chu Chai's Law of Banking Volume 2: Pledges, Guarantees and Letters of Credit (Third Edition), pp 464, 465
Supreme Court Practice 1991, vol 1 part 1, para 18/7/3, p 280

For the appellants - Suria Kumar DJ Paul; M/s Suria Kumar & Co
For the respondents - Ong Kim Buai (Julie Teh Chooi Gan with her); M/s Dorairaj, Low & Teh

[Appeal from High Court, Kuala Lumpur; Civil Appeal No: R2-12-208-1999]

Reported by Usha Thiagarajah

JUDGMENT

Abdul Malek Ahmad PCA:

The respondents, who were the plaintiffs in the Sessions Court, are partners in Pakatan Reka Arkitek while the second, third and fourth appellants are directors of the first appellant. The respondents had rendered architectural services to the first appellant for a project at Lots 80 and 81 at section 7, Petaling Jaya.

By letter dated 7 May 1991, it was agreed between the parties that the first appellant was to pay the sum of RM217,002.50 to the respondents for the architectural services rendered. The letter is reproduced below:

pakatan reka arkitek
ARCHITECTURE PLANNING INTERIOR DESIGN

Reference: PRA/9001/A
7 May 1991

North South Properties Sdn Bhd
Bangunan North South
60 Jalan Besi
Off Jalan Sungei Besi
57100 Kuala Lumpur

Dear Sirs,

PROPOSED OFFICE BUILDING ON LOTS
80 & 81, SECTION 7, PETALING JAYA,
DISTRICT OF PETALING
– Agreement On Professional Fees –

We refer to the meetings between your YB Tuan Haji Megat Najmuddin and our Mr David Teh on the payment of professional fees for services rendered for the above project.

We write to record that the sum of $217,002.50 has been agreed as full settlement of fees for services rendered by Pakatan Reka Arkitek. North South Properties Sdn Bhd has requested that payment be made *via* a post-dated cheque No. MBB 259920 dated 29 October 1991.

The two parties, Pakatan Reka Arkitek and North South Properties Sdn Bhd further agreed on the following:

1. That Pakatan Reka Arkitek has discharged their duties faithfully.

2. That there will be no further claims by one party against the other on any matters arising.

3. That in appreciation of the goodwill extended by Pakatan Reka Arkitek, North South Properties Sdn Bhd agreed to consider a further sum as compensation for termination of Pakatan Reka Arkitek's services.

As requested, in interest of the project and for goodwill, we forward herewith our 'letter of release' to enable another Architect to be appointed.

We would be grateful if you could sign the duplicate of this letter to confirm the above agreement.

Yours faithfully

PAKATAN REKA ARKITEK	NORTH SOUTH PROPERTIES SDN. BHD.
Sgd.	Sgd.
David Teh	

In addition, the second, third and fourth appellants also gave an undertaking dated 9 May 1991 that the agreed sum would be paid on or before 29 October 1991. That undertaking reads:

NORTH SOUTH PROPERTIES SDN BHD
BANGUNAN NORTH SOUTH, 60 JALAN BESI,
OFF JALAN SUNGAI BESI, 57100 KUALA LUMPUR

Your Ref:PRA/9001/A	Date: 9 May 1991
Pakatan Reka Arkitek 39A Jalan Dato Haji Eusoff Kompleks Damai 50400 Kuala Lumpur	Perakuan di bawah Sek. 48 Akta Setem 1949 Disahkan di bawah Seksyen 47A, (1) Penalti sebanyak $25/- dijelaskan/ diuruskan sepenuhnya. Sgd. Timb. Pemungut Duti Setem, K. Lumpur JHDN (illegible)

Dear Sirs,

PROPOSED OFFICE BUILDING ON LOT 80 & 81 SECTION 7, PETALING JAYA DISTRICT OF PETALING – AGREEMENT ON PROFESSIONAL FEES –

We refer to your letter dated 7 May 1991 regarding the above.

We, the undersigned being the Directors of the Company hereby give you our joint and several undertaking that the sum of M$217,002.50 referred to paragraph 2 (two) of the said letter dated 7 May 1991 shall be paid to you on or before the 29th day of October 1991.

Yours faithfully

NORTH SOUTH PROPERTIES SDN BHD

Sgd. Sgd.

HJ MEGAT NAJMUDDIN BIN DATO SERI (DR) HJ MEGAT KHAS
IC NO 2082834

YAP CHENG HOCK
IC NO 1493019

Sgd.
WITNESS:
NAME: GO PECK HAR
IC NO: A 0354265.

However, when the abovementioned cheque was presented for payment, it was stopped. The respondents commenced the action to recover the amount and filed an application for summary judgment under O. 26A of the Subordinate Courts Rules 1980 (hereinafter "the SCR").

It was the contention of learned counsel for the appellants that:

(a) this action is time barred since the architectural services rendered was up to 27 April 1991, the date the cause of action arose for non-payment, whereas the action was commenced only on 24 October 1997 – limitation has set in as it is more than six years;

(b) the cheque cannot be relied upon as the basis for the cause of action because the issue of the cheque was not pleaded in the statement of claim and the respondents were confined to their pleadings only;

(c) the second, third and fourth appellants are not liable under the letter of undertaking dated 9 May 1991 because it is not a letter of undertaking but merely a "comfort letter" which is not binding;

(d) the second, third and fourth appellants are not liable because there was no consideration for the undertaking given by them; and

(e) the payment on the cheque was stopped because the architectural services rendered by the respondents were not satisfactory.

However, the learned Sessions Court Judge allowed the application for summary judgment and on appeal to the High Court, the learned High Court Judge held as follows:

(a) that the cause of action only arose on 29 October 1991 when the obligation to pay arose and there was no payment received by the respondents. Therefore, the claim is not time barred;

(b) that the respondents' cause of action was based on the non-payment of architectural services rendered and not on the cheque dated 29 October 1991. Under the agreement dated 7 May 1991 the appellants are bound to pay RM217,002.50 to the respondents;

(c) that the contents of the letter dated 9 May 1991 signed by the second, third and fourth appellants show that it is a letter of undertaking and not a comfort letter. The language is clear especially the usage of the word "undertaking" in the letter. Further the letter contains a witness's signature and it was stamped. Therefore, it shows the clear intention of the parties that it is intended to bind them; and

(d) that the architectural services rendered was the consideration for the undertaking given by the second, third and fourth appellants pursuant to s. 2 of the Contracts Act 1950 wherein the respondents agreed to accept the payment due on 29 October 1991.

The date learned counsel for the appellants maintained was the date the cause of action occurred, namely, 27 April 1991. This was the date the independent adjudicator issued his findings on the dispute and, for effect, is reproduced below:

HAJI HAJEEDAR HAJI ABDUL MAJID
Dipl.Arch.(Port.) APAM, ARIBA, Cert. City Planning (Tokyo)

27th April 1991

Y.Bhg. Tuan Haji Megat
12th Floor Menara SMI
No 6 Lorong P Ramlee
50250 Kuala Lumpur

Pakatan Reka Arkitek
39A Jalan Dato Haji
Eusoff
Kompleks Damai
50400 Kuala Lumpur
(Attn: Mr David Teh)

Mr C H Yap/Mr Lawrence Lai
North South Properties Sdn Bhd
Bangunan North South
60 Jalan Besi
Off Jalan Sungai Besi
57100 Kuala Lumpur

Dear Sirs,

PROPOSED OFFICE BUILDING ON LOTS 80 & 81, SECTION 7 PETALING JAYA.

Further to your reference to the undersigned to act as the ultimate adjudicator in respect of the dispute on professional fees payable to the architect, I am pleased to append below my findings which is final.

The basis of my assessment and adjudication is as follows:

1) that both parties have agreed to appoint the undersigned as the ultimate adjudicator to resolve the reasonable quantum due to Pakatan Reka Arkitek for works done up to their termination.

2) The undersigned held separate hearings with the client and architect respectively. The evaluation was also based on verbal representation of parties and two separate bundles of documents from the client and architect.

   A set of architectural drawings supplied by the client (and agreed by the architect) was also used as basis of the evaluation.

3) Upon termination, the cost plan for the project was established at $22,420,000.00 and professional fee was agreed at 4.5% of the total project cost.

4) The services extended by the architect as per the basic scopes of work was partial and incomplete. As such the amount due shall be proportionate to the level of service achieved at both the Schematic and Design Development Stages. It was noted that the stages were overlapped and developed concurrently.

Having considered the views of both parties and perused the written documents and architectural drawings, the undersigned is of the opinion that the fee due to the architect is as follows:

Design Fee Calculation

Estimated project cost of office tower with podium based on the Cost Plan (excluding all external works, special works, contingencies and inflation allowances)	…	$22,420,000.00
Professional fees, as agreed: 4.5% of total project costs = 4.5% x $22,420,000.00	=	$ 1,008,900.00
Fees due to Architect:		
Schematic Design: 90% of 15% = 90% x (15% x $1,008,900	=	$ 136,201.50
Design Development: 30% of 30% = 30% x (30% x $1,008,900)	=	$ 90,801.00
		$ 227,002.50
Less: Amount paid earlier to the architect … …		$ 10,000.00
AMOUNT DUE		$ 217,002.50

The undersigned declares that the amount established above has been derived at objectively without prejudice to either party.

I return herewith your respective documents and drawings.

Yours faithfully,

Sgd.
HAJI HAJEEDAR HAJI ABDUL MAJID.

In *Reeves v. Butcher* [1891] 2 QB 509, it was held that the Statute of Limitations was a good defence, for that the time began to run from the earliest time at which the plaintiff could have brought her action, that is, twenty one days after the first instalment of interest became due. It also held that "This expression, "cause of action," has been repeatedly the subject of decision, and it has been held, particularly in *Hemp v. Garland* 4 QB 519, decided in 1843, that the cause of action arises at the time when the debt could first have been

recovered by action. The right to bring an action may arise on various events; but it has always been held that the statute runs from the earliest time at which an action could be brought.".

In *Nadefinco Ltd. v. Kevin Corporation Sdn. Bhd.* [1978] 2 MLJ 59, the Federal Court was of the view that the cause of action in that case accrued the instant the mining company failed to pay the first instalment due and therefore the action was barred by limitation, the action being commenced more than six years after the cause of action arose.

As regards the question of the cheque not being stated in the pleadings despite the details of the date of the payment pursuant to the agreement made between the parties, learned counsel for the respondents relied on para. 18/7/3 at p. 280 of the *Supreme Court Practice 1991,* Volume 1 Part 1 which states:

> Material facts, not evidence – Every pleading must contain only a statement of the material facts on which the party pleading relies, and not the evidence by which they are to be proved (per Farwell LJ in *N.W. Salt Co. Ltd. v. Electrolytic Alkali Co. Ltd.* [1913] 3 KB 422, 425). "The distinction is taken in the very rule itself between the facts on which the party relies, and the evidence to prove those facts" (per Brett LJ in *Philipps v. Philipps* [1878] 4 QBD 133). All facts which tend to prove the fact in issue will be relevant at the trial, but they are not "material facts" for pleading purposes. "It is an elementary rule in pleading that when a statement of facts is relied on, it is enough to allege it simply without setting out the subordinate facts which are the means of proving it, or the evidence sustaining the allegation" (per Lord Denman CJ in *Williams v. Wilcox* [1838] 8 A. & E. 314, p. 331; and see *Stuart v. Gladstone* [1879] 10 Ch. D 644).

Pertaining to the other payments made by the first appellant before the agreement namely RM10,000 on 29 June 1990 and RM20,000 on 6 February 1991, these were before the independent adjudicator's finding although there is mention made in his letter of one earlier payment of RM10,000.

In *Poh Chu Chai's Law of Banking Volume. 2: Pledges, Guarantees and Letters of Credit (Third Edition)* at pp. 464 and 465, the author says a performance bond or guarantee has to be distinguished from a letter of comfort. Unlike a performance bond or a guarantee which embodies a legally binding undertaking, a letter of comfort is usually a statement of moral responsibility which is not intended to have any legally binding effect. Whether a letter of comfort is capable of giving rise to a legally binding undertaking will depend on the intention of the parties and the circumstances under which the letter of comfort is given. We are of the considered opinion here that the letter signed by the second, third and fourth appellants was in fact a letter of undertaking and not a letter of comfort.

There has also been no complaint made by the appellants as regards the architectural services rendered by the respondents at any stage. The agreement made between them pursuant to the independent adjudicator's finding and letter of undertaking by the second, third and fourth appellants is further testimony of the fact that the payment was correctly due from the appellants to the respondents. The cause of action accrues on the date of the postdated cheque because before that date, the respondents were not entitled to make any claim in view of the agreement made.

Before us, the same issues were canvassed and we dismissed the appeal with costs on the grounds that there were no triable issues raised. Further, we find both the Sessions Court and the High Court were correct in coming to the same finding. The deposit is to go to the respondents to the account of taxed costs.

Subsequent to our order, learned counsel for the respondents asked for the release of the money deposited with court on 27 July 2000 with all the relevant interest. Learned counsel for the appellants had no objections and we accordingly ordered that the money deposited into court is to be paid out with all the relevant interest.